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AMERICAN JUDICATURE SOCIETY
Ann Arbor, Michigan

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To Promote the Efficient Administration of Justice

Founded in 1913 by Herbert Lincoln Harley

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Vol. 32, No. 5 GLENN R. WINTERS, Editor February, 1949

The Waters Are Troubled

LEGISLATIVE BODIES of California, Massachusetts, New Jersey, New York, Rhode Island and South Carolina meet every year; those of Kentucky, Louisiana, Mississippi and Virginia meet in the even-numbered years. All the rest convene in the odd-numbered years, of which 1949 is one. All sessions open in January except Florida, which begins in April, and Alabama and Louisiana, which start in May. Thus, of the forty-eight state legislatures, forty-two are in session this month, and the forty-third and forty-fourth, Alabama and Florida, will be coming along in a few weeks.

Most measures for the improvement of the administration of justice require legislative action at some point or other. The majority of them may be dealt with by statute alone; if constitutional amendment is required, the process normally is initiated by resolution of the legislature; and even in those instances where rule of court is the appropriate procedure, many courts wait for a legislative "grant" of the rule-making power.

With the 1949 legislative season now upon us, during the next few weeks there will be more opportunities and more accomplishments in the field of judicial administration than at any other time between 1947 and 1951. By the time this JOURNAL reaches its readers some legislatures will already be looking toward adjournment, for many of them are limited to a sixty-day session.

In succeeding issues the JOURNAL will endeavor to report as fully as possible both the accomplishments and the disappointments of interest to our readers. Where the time since 1947 has been spent in preparation of 1949 bills and in paving the way for favorable action on them, prospects for important accomplishments and advances are good. Elsewhere, it may not yet be too late. Those who have done research and drafting for their own purposes will be glad to share the benefit of their labors with others. It is late, but why not try?

At the Pool of Bethesda an angel came "at a certain season" and troubled the waters, and the sick man who stepped in while the waters were troubled was healed. In between times, there was nothing to do but wait and get ready to get in at the time of the next visitation. For most of us the waters are troubled now. If you cannot get in, get in line for 1951.

The idea that lawyers should unite to promote a more efficient administration of justice was first proposed by Herbert Lincoln Harley, who devoted the best years of his life to this form of service.

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READERS CAN HELP us in reporting legislative developments during the coming months. A commercial legislative reporting service is available, giving copies of all bills introduced in all legislatures on specified topics, together with progress reports at each stage of handling, text of amendments, and text of statute as passed. Unfortunately, the cost of such service with only one subscriber taking it is prohibitive, and we must rely upon other sources of information. State bar journals are our best single source of information, but not all states are so covered, and even then they do not always give the text of bills. Co-operation of readers in sending us copies of bills dealing with judicial administration topics, including house and senate numbers if possible, reports of action taken, and text of enacted statutes, will be gratefully appreciated.

WE ANTICIPATE a letter from at least one astute reader inquiring whether our approving republication of Judge Frank's dissertation on special verdicts in this issue constitutes a retraction of our stand against lengthy judicial opinions. It cannot be denied that except for a few lines on page 147 this opinion is all dictum—in reality a pure legal essay—and that much of what has been said about long opinions applies to it. . . . It is original, useful and constructive, however, and worthy of publication somewhere, and our escape from the dilemma is to invite Judge Frank to write more like it and let us publish them in the first place, rather than the *Federal Reporter*. . . . Perhaps in our concern over the law book problem we have been overemphasizing brevity anyway, as if literary style, good English, accuracy, clearness and other features of judicial opinions did not matter so much. Mrs. Wall's account of Judge Gordon Simpson's survey on what the courts are doing to improve their opinions in all these respects should help to even up the count. The fact is, they all tie in together, and a shortened opinion is likely to be better all around. . . . As may be seen in the "Reader's Viewpoint" department, William Scott Stewart's provocative article last December denouncing the public defender system as unsound has not been allowed to pass unchallenged. A number of other letters and manuscripts in defense of the institution have come in too late for publication this month. As many of them as possible will appear in the next issue.

INTERIM APPOINTMENT to fill a vacancy has brought many a judge to the bench for the first time, even in states with an elective judiciary. Just how many nobody ever knew, until Judge William Logan Martin, who has been leading a campaign for an appointive judiciary in Alabama, checked court records for 56 years back and found, according to last month's *Alabama Lawyer*, that 40.4 per cent of all Alabama judges during that time were originally appointed to the office. The corresponding figure in most states would not be much different. It is too small to allow opponents of the proposed reform to claim that a *de facto* appointive system is already in effect, as has sometimes been suggested in this connection, but it is large enough to show that the method of executive appointment is already in very widespread use and that no state would be taking a jump in the dark to adopt it completely. Freeing the appointees from the burden of subsequent election campaigning, however, as in Missouri, would be of immense help to any governor in securing the best men to fill these important posts.

MEMBERSHIP of the American Judicature Society passed the 10,000 mark last month, climaxing a period of steady growth from 1932 when only 663 dues-paying members were enrolled. It reached 1,000 in 1936, 2,000 in 1940, and 5,000 in 1943.

Courtroom Photographing and Broadcasting

Recently the State Bar of California Committee on Rules on Appeal, with the approval and authority of the State Bar's Board of Governors, proposed a Superior Court rule prohibiting court-room photographing and broadcasting. The Court referred the proposal to the state Judicial Council. A press article states that the Council "turned thumbs down" on the proposal, "contending that the matter is up to each individual judge" and the Council felt that "the presiding judge in each court has full liberty to conduct his court as he sees fit and proper."

The real point appears to have been overlooked. Can it be gainsaid that "courts exist to promote justice and thus serve the public interest?" If not, it follows that judges are created for courts, not courts for judges. The manner in which an important unit of government shall function in administering justice surely is not inhibitive of a general regulation of the kind proposed, binding upon *all* judges. Fortunately, there are increasing indications that the bench and bar of this country are realizing their responsibility for the administration of the judicial processes. Too long was that responsibility permitted to rest with individual judges, rather than with the collective judiciary. Widespread agitation for a unified state judiciary is a healthy manifestation.

The State Bar of California committee butressed its proposal with a brief portraying the obviously undesirable effect of such photographing and broadcasting upon all those involved in court trials. To this there may be added the difficult position of the judge who, unaided by prohibitory rule of general application, endeavors to eliminate such practices in his particular courtroom; a problem especially aggravating if the judge be an elected official.

American Bar Association Judicial Canon 35 reads:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."

The canon has been officially adopted or approved by the Supreme Courts of Florida, Michigan, South Dakota, Virginia and West Virginia, and by the state bar associations of Arkansas, Georgia, Indiana, Iowa, Kansas, New Jersey, New Mexico, New York and Oregon. There may be others. The Supreme Court of Oregon recently appointed a committee to draft canons of judicial ethics. The Conference of Senior Circuit Judges of the United States has barred such photographing and broadcasting in all of the United States District Courts, in criminal cases. General prohibitory rules have been adopted by federal district courts in Colorado, District of Columbia, Minnesota, Oklahoma and Wyoming.

The trend is, and should be, against the decision of the Judicial Council of the State of California.

G. E. B.

Advice to the youthful Frank C. Haymond, now judge of the Supreme Court of Appeals of West Virginia, by his jurist father:

"You should not do a thing merely because you have the power to do it."

Sound advice, and still widely applicable.

Surveying the Legal Profession: in Whose Interest, How, and to Test What Hypotheses?

By CHARLES O. PORTER

"For many centuries the doctor has been confronted with the challenge, oft-times derisive, 'Physician, heal thyself!' The lawyer, with his vaunted prowess in organizing human complexities and settling vexatious disputes, is with equal aptness enjoined, 'Lawyer, counsel thyself!' The Survey of the Legal Profession is a collective venture to do just that."

WHEN A GROUP OF MEN pre-empt the words "Survey of the Legal Profession" to designate a nationwide study with $150,000 to spend in three years, an inquiry into the objectivity, the research plans and the working hypotheses of these men is in order. The following questions, as put to Survey personnel by a goodly number of hard-headed, somewhat cynical lawyers, serve to bring the grandiloquent phrase closer to earth:

I. Is the Survey an effort by the American Bar Association and/or the legal profession to whitewash itself or themselves?
II. How is the Survey going to survey the legal profession?
III. What is the Survey trying to prove?

These are fair questions and this paper is an attempt to set forth the answers to them.

I

The whitewashing implication in the first question is likely to arouse a few indignant splutters, perhaps particularly from chieftains in the American Bar Association, some of whom will feel called upon to point to the Association's record of accomplishment and to the unassailable probity of its leaders. It may be admitted that it is preposterous, even impertinent, to believe for an instant that the Association would set up the Survey to—changing the metaphor slightly—clean mud off its skirts and incidentally off the skirts of the profession it represents nationally. The point is that many lawyers in many widely separated cities of the United States have put the question in all seriousness to Survey personnel: In whose interest is the Survey? That query is best answered by first reciting the facts of the Survey's genesis.

The Survey of the Legal Profession, launched early in 1948, originated after four years of planning by the Legal Education and Admissions to the Bar Section of the American Bar Association. At first the plan encompassed only legal education and bar admissions. The project burgeoned to its present magnitude when the Section members concluded that standards for legal education and admission to the bar necessarily stemmed from what a lawyer's work was and, in part, what it should be. "How can we train or qualify a man to practice law," they asked themselves, "unless we know what a lawyer's work is?"

"The plain fact," wrote Albert J. Harno, chairman of the Section and dean of the University of Illinois Law School, "is that legal education does not have and has never had any clearly defined objectives."[1] In February, 1946, the Section recommended a nationwide

CHARLES O. PORTER is a member of the Oregon bar and Assistant to the Director of the Survey of the Legal Profession. A native of Oregon, he was educated in the Eugene, Oregon, public schools and Harvard College and Law School, from which he was graduated in 1947. Thereafter and until he took up his present work in June, 1948, he served as law clerk to Judge William Healy of the United States Court of Appeals for the Ninth Circuit in San Francisco. Mr. Porter spent four years in the army during the war, and is a member of the Council of the Harvard Law School Association. A previous article by him entitled "Defects of the Administration of Justice in Hamilton County, Ohio" appeared in the JOURNAL last June.

1. Outline Plan for a Study of the Legal Profession and Legal Education in the United States, p. 1 (mimeographed), February 12, 1946; reprinted in 17 Okla. Bar Ass'n. Jour. 1233-7.

study of the professional services of lawyers, of their public service, of their part in the selection of judges and the framing of judicial rules, and of their economic position. Subsequently, the organized bar was added to these main headings. The center of the research program was the lawyer exercising, as best he could, his lawyer-training in the jobs society assigned to him.

After reviewing the plans prepared by the Section and the American Bar Association, Carnegie Corporation of New York voted a grant of $100,000. The Association pledged $50,000. Its then president, Carl B. Rix, after consultation with colleagues, appointed the executive council which then chose a director to assume personal charge of the work. Because the Association started it, planned it, and obtained the grant from Carnegie Corporation, the Survey is said to be "under the auspices of the American Bar Association." This is misleading if it implies that the American Bar Association retained any measure of control over the Survey. The truth is that the Survey is autonomous.

It may be well to stop at this point to take notice of the reader who is shaking his head knowingly, muttering to himself that the Survey, even if not designed to glorify the American Bar Association, can rise no higher than the prejudices and passions allegedly ingrained in that organization; that the Survey will be merely a craven creature of the Bourbons of the bar and without a soul of its own. These are opinions that lawyers have expressed to Survey field workers time and again.

> But like most other elements of the community, we are in a sense the victims of changes, of whose nature and effect we are not still wholly aware. Hence it is that the bar needs to know and to focus its attention upon the facts, not in the form of assumptions or generalizations, nor yet on the details of petty misconduct in its disreputable outer fringes, but upon data patiently assembled and organized so as to show with the powerful impact of revealed truth the extent to which devotion to private interests has obscured our vision of the public welfare. . . .
>
> All this cannot be done in those occasional and brief intervals when the busy lawyer secures some respite from the pressing demands of clients to participate in the festivities of bar association meetings. It requires study and investigation, the painstaking gathering of data and their portrayal in such fashion that we may know the facts and, knowing them, develop a consciousness of their implications for our profession.
>
> —HARLAN F. STONE

Only twenty per cent of the nation's lawyers belong to the American Bar Association. Many of the members do not keep abreast of its activities. The organized bar including the American Bar Association, has a lot to learn about public relations. It is no wonder that misapprehensions exist and persist. There is no need to argue these slurs on the merits, the ample answer being that the Survey work is neither censored nor reviewed for any purpose by the Association. Both Carnegie Corporation and the Association insisted on bestowing complete and unrestricted powers on the Council. The Council is solely responsible. If the Council disagrees with the Director, both or all sides will find space to print their varying views in the reports, which may ultimately appear in book form. It is a fact that the President of the American Bar Association sits *ex officio* on the Council, but he is only in his position one year and he is one man in fifteen. The Council members[2] are not the sort of citizens who would be accessories in a

2. Council members: Orie L. Phillips, *Chairman*, Presiding Judge of the U. S. Court of Appeals for the Tenth Judicial Circuit; Albert J. Harno, *Secretary*, Dean of the University of Illinois Law School; Howard L. Barkdull, Attorney, Chairman of the House of Delegates of the American Bar Association, 1946-48; James E. Brenner, Professor of law at Stanford Law School; Herbert W. Clark, Attorney, Chairman of American Bar Association Section of Legal Education; Charles P. Curtis, Attorney and author; John W. Davis, Attorney, formerly Solicitor General of the United States; John S. Dickey, President of Dartmouth College; Devereux C. Josephs, President of New York Life Insurance Company; Wm. Clarke Mason, Attorney, member of Board of Governors of American Bar Association; Harold G. Moulton, President of Brookings Institution; Carrol M. Shanks, President of the Prudential Insurance Company of America; Reginald Heber Smith, Attorney, Director of the Survey of the Legal Profession; Robert G. Storey, Attorney and Dean of Southern Methodist Law School; Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme

subsidized whitewashing or a documented apologia. Not only is the Council autonomous, but it can fix its own size and elect its own membership. There is no restriction as to the number of lay members. If a majority of the present Council come to believe that more lay influence is advisable, the additions may be made at once.

On this evidence, the cynical may be constrained to admit that the Survey's cards are not stacked to favor the American Bar Association. However, discerning skeptics are wont to insist that lawyers cannot study lawyers and remain objective. This is a more serious matter.

In the face of emphatic advice from eminent professional research experts, whose counsel was solicited on a fee basis, it was decided early in 1948, in accordance with long-standing plans, that lawyers, aided by laymen, woud direct the Survey. The analysis of the experts, based on their study of the Survey's plans and talks with the Director, says in part:

"Probably no specialized group should try to study itself, and no study should overlook the techniques of research and analysis available to those outside the profession. The present allocation of work is almost entirely to practicing lawyers, judges and law school teachers on the basis of their outstanding achievement in the particular field of activity. This qualification would be more relevant to their use as consultants, advisers, critics, and more especially key informants.

"The research should be done by people trained in the use of the particular tools of research being used in that particular project. It will only be occasionally that the outstanding lawyer in a particular field is also versed in the methods of research to be used.

"The results of the present organization cannot help but be an informed, ably written, sophisticated self-analysis. The thinking of the study as a whole will be a great contribution to the large literature already extant on the ideas of the profession, and as such would be invaluable raw material for research; *but it will not itself be a survey of the profession.*" (Emphasis added.)

These experts recommended a full time professional research staff. In addition to "scholars in the fields of law and comparative jurisprudence," they wanted to enlist economists, political scientists, social psychologists, social anthropologists, a social historian, and specialists in opinion polling. The report continues:

"It is usually with such staffs that true research, involving acquisition of new data is effectively conducted. Other methods all too frequently result in mere re-arrangements of the informed opinions of eminent minorities in the upper income brackets of the particular profession involved.

"The lawyer is by training, intellectual discipline and practical experience obviously better able to conduct parts of the research than would be the case in most professions. However, there are few persons in any vocational group who can see themselves straight. Moreover, if they could it would be hard to convince the public of this fact."

Subject to financial limitations, modern research techniques and social scientists are being used in the Survey, but lawyers remain in control. Thanks to Dean Pound and others in the field of sociological jurisprudence, the good lawyer today, in the opinion of Reginald Heber Smith, Director of the Survey, is likely to be acquainted with the worthwhile research techniques. "The danger of bias, especially unconscious bias, on the part of lawyers concerning themselves is very real," Smith concedes. These "blind spots" are diminishing considerably, he says. In reply to the experts, he wrote:

"The amount of self-examination and self-analysis that has been done by lawyers, law teachers and bar associations is amazing. The public knows nothing of this because lawyers know so little about publicity. The record will show that lawyers have thought through and fought through major reforms in international law (including adherence by the United States to the World Court), in the selection of honest judges, in taxation, in control of the multifarious administrative agencies, in legal aid, in legal assistance to the armed forces, in higher standards of legal education and admission to the bar, and in establishing efficient rules for civil and criminal procedure for the federal courts."

The criticism of the Lay Advisory Committee[3] and the lay members on the Council ("not of a type to be intimidated," says Director Smith) should suffice to eliminate the blind spots. The Director believes that lawyers must have the responsibility for the direction of the

Court. Frank E. Holman, President of the American Bar Association, is an ex-officio member of the Council. Walter M. Bastian, Treasurer of American Bar Association, is Treasurer of the Survey of the Legal Profession, but not a member of the Council.

3. Lay Advisory Committee: Charles P. Curtis, *Chairman;* Theodore C. Briggs, Lawyers' Cooperative Publishing Society; Professor J. Frank Dobie, University of Texas; Frederick M. Eliot, president of the American Unitarian Association; Dr. Channing Froth-

Survey because the "feel" of professional work is indispensable and cannot be acquired in any reasonable time, if at all, by professional research men. To support his position, he cites the late L. J. Henderson's reasoning with respect to the ideal nature of medical research:

"The first element is hard, persistent, intelligent, responsible, unremitting labor in the sick room, not in the library; the complete adaptation of the doctor to his task, an adaptation that is far from being intellectual.

"The second element is accurate observation of things and events, selection, guided by judgment born of familarity and experience, of the salient and recurrent phenomena, and their classification and methodical exploitation.

"The third element is the judicious construction of a theory—not a philosophical theory, nor a grave effort of the imagination, nor a quasi-religious dogma, but a modest pedestrian affair—a useful walking-stick to help on the way.

"All this may be summed up in a word: he must have first, intimate, habitual, intuitive familiarity with things; secondly, systematic knowledge of things; and thirdly, an effective way of thinking about things."[4]

The Survey, then, intends to accomplish no calculated whitewashing of the American Bar Association or of the legal profession. Its independence and the calibre of its leaders, some of whom are laymen, guarantee that the results will be no mere narcissistic, defensive introspection, but will be in the best interests of our society and our legal profession and in that order of precedence.

II

The answer to the second question, "How is the Survey going to survey the legal profession?" can be found in an account of what is presently occurring. The Director and the Council serve as planners, policy makers, coordinators and editors, working from an outline which was contrived after much travail. This outline breaks into six divisions:

I. Professional Services by Lawyers.
II. Public Service by Lawyers.
III. Judicial Service and Its Adequacy.
IV. Professional Competence and Integrity.
V. Economics of the Legal Profession.
VI. The Organized Bar.

Men called Consultants are in charge of particular topics within these divisions and are responsible for the reports. It is the Director's responsibility to find the best men for the tasks. Incidentally, only four research men are paid salaries. The rest of the workers, including the Council and the Director, work for nothing. Helping the Consultants are Committees of Experts and State Representatives. A Consultant is encouraged to take complete charge of his assignment. Normally no one higher in the Survey hierarchy is capable of advising an authority of his stature. After he submits his report, the Council members and the Director will carefully examine it. They may make suggestions for further explorations or simply for clarifications.

The legal profession as it functions in the United States today is not amenable to a pat analysis. Subjects are still being added to the Survey's agenda. Others are being revised. Much of what the Survey is doing, says Director Smith, is "straight pioneering." The research expert's apprehension that the Survey's methods will lead to a "mere re-arrangement of the informed opinions of eminent minorities in the upper income brackets" of the profession is a misleading mixture of half-truths. The active members of the bar, as in all groups, professional and otherwise, are an eminent minority perforce. American Bar Association members, on the average, do earn substantially more than other lawyers, according to the preliminary findings of a lawyer income study by the Department of Commerce. However, the men who are making the Survey's plan succeed, and who with rare exceptions are members of the American Bar Association, are not in the higher income brackets of their profession. They are judges, law school teachers,

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ingham, physician, and chairman of the Committee for the Nation's Health; Stanley King, former president of Amherst College; the Rt. Rev. Eric F. MacKenzie, chief legal officer for the Archdiocese of Boston; Sumner Welles, former Undersecretary of State; Laurence Winship, Managing Editor of the *Boston Globe*. These men will criticize the Survey's plans and reports as they appear.

Dean Albert J. Harno, Consultant for Legal Education, has appointed a lay advisory committee to assist him. This committee includes: Bertram J. Cahn, President of B. Kuppenheimer & Co. of Chicago; Dr. Frank G. Dickinson, Director, Bureau of Medical Economic Research of the American Medical Association; Robert L. Johnson, President of Temple University; M. G. Kispert, Assistant to the President of Massachusetts Institute of Technology; Richard L. Kozelka, Dean of the School of Business Administration of the University of Minnesota; G. Herbert Smith, President of Willamette University.

4. Quoted by Elton Mayo, *The Social Problems of an Industrial Civilization*, p. 47.

SURVEY OF THE LEGAL PROFESSION—ORGANIZATION CHART

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(A) *Services in Law Offices for Retainers, Fees, Etc.*
- To Men, Women, Children
- Advice, Negotiation, Conciliation
- The Family Lawyer
- In the Courts
  - Civil
  - Criminal
- To Estate and Property; Trustee, Executor, Guardian
- To Organized Labor
  - National
  - State
- To Business Corporations
  - Legal
    - Receiverships
    - Reorganization
  - Finance
  - Labor
  - Planning
- To Charitable Corporations and Foundations

(B) *Salaried Services in Government*
- Federal
  - Attorney General
  - Taxation, etc.
- State
  - Attorney General
  - Commissions
- Local
  - Corporation Counsel

(C) *Salaried Services in Business*
- General Counsel
- Executive

(D) *Availability of Lawyers' Services*
- Legal Aid
- Public Defender
- Lawyer Reference Plans
- Low-Cost Service Bureaus

(E) *Workmen's Compensation*

(F) Legal Clinics

DIVISION II: PUBLIC SERVICE BY LAWYERS

(A) *War Work*
(B) *Service to Armed Forces*
(C) *War Staff Non-Legal Work*
(D) *Bill of Rights*
(E) *Labor Relations*
(F) *Public Relations*
(G) *Legislation*
(H) *Arbitration*
(I) *Municipal Government*
(J) *Civil Service*
(K) *The Lawyer and the Community*
- Charity Boards
- Civic Groups
- Community Chests
- School Communities
- Forums
- Radio

DIVISION III: JUDICIAL SERVICE AND ITS ADEQUACY

(A) *Courts*
- Judicial Administration
- Judicial Conferences and Judicial Councils
- Assigned Counsel
- Criminal Law

(B) *Appointment and Election of Judges*

(C) *Administrative Agencies*
- Federal
- State

DIVISION IV: PROFESSIONAL COMPETENCE AND INTEGRITY

(A) *Legal Education*
- Pre-Legal Education
- Post Legal Education
- Law Schools
- The Young Law School
- Intellectual Discipline
- Placement

(B) *Admission to the Bar*
(C) *Professional Ethics, Discipline and Disbarment*
(D) *Law Libraries*

DIVISION V: ECONOMICS OF THE LEGAL PROFESSION:

Cost of Legal Services; Earnings; Specialization; Security

(A) *Number of Lawyers*
- In Active Practice
- In Business
- On the Bench
- Retired
- Part Time

(B) *Their Distribution*
- By States
- Urban Centers
- Small Towns

(C) *Financial: Income—Overhead—Taxes*
- Gross Income
- Office Expenses
- Net Before Taxes
- Bills to Clients
- Minimum Fees
- Standard Fees
- Taxes
- Capital Invested

(D) *Legal Expenses in the Consumer's Budget*

(E) *Organization: Partnerships; Solo Practice*
- Individual Practice
- Small Firms
- Large Firms
- Staffs
- Efficiency
- Specialization
- Cost Control

(F) *Retirement and Security*
- Age of Retirement
- Social Security
- Group Insurance
- Pension Annuity Provisions

(C) *Competition. Unauthorized Practice of Law*
- Banks
- Title Companies
- Tax Burdens
- Collection Agencies

DIVISION VI: THE ORGANIZED BAR

(A) *National*
- American Bar Association
- National Bar Association
- National Association of Women Lawyers
- National Lawyers Guild
- Federal Bar Association
- Patent Bar Association

(B) *State and Local*

(C) *Metropolitan*
- New York City
- Los Angeles
- Boston
- Chicago

(D) *Junior Bar*
(E) *History of the Bar*
(F) *The Bar in Other Countries*
- Canada
- China
- England
- France
- Italy
- Russia
- Switzerland

(G) *Civil Law*

college professors, and lawyers who have been but moderately successful financially.

As for their opinions being "informed," this is invariably true. On the other hand, they most of all recognize the shortcomings of the information currently available as a basis for sound opinions about lawyers. A desire to follow their hunches through organized research is the reason they serve with enthusiasm and diligence but without compensation. They could never be content with "mere rearrangement" of extant data.

Previous surveys by the bar have not only been few and far between but have been on a state, or smaller unit, basis and have been concerned with only a fraction of the problems posed in this Survey. No previous study of lawyers was blessed with a fraction of the money and personnel being employed in this Survey.[5]

Men of experience and insight are being requested to express their opinions on their lifelong specialties. These participants will tell what they have done, seen and now believe instead of, or in addition to, trying to collect the experiences and views of others. Questionnaires and interviews possess profound failings for which there must be compensation in this manner. Statistically supported generalizations need a context and there is no substitute for the perspective, the Director believes, supplied by the man of experience.

Most Consultants are using questionnaires, however, after consultation with their Committee of Experts. Interviews and on-the-spot inspections are being used for *all* law schools in the United States, *every* legal aid organization, most lawyer reference plans, most of the other associations of the organized bar, and in numerous other areas.

In the spring of 1948, the Department of Commerce, after allowing the Director to make several amendments, mailed a questionnaire concerning their incomes to 21,000 lawyers. During this same period Dr. Earl Lomon Koos, chairman of the Sociology Department at the University of Rochester, directed a study, by interview and questionnaire, of the legal needs of the lower income and middle income classes. Sample families were scientifically selected in Akron, Atlanta, Nashville, Oakland, Rochester, and Seattle. More than 4,000 families were included.

Several of the Survey reports will be "dissertations." For example, Professor John N. Hazard of the Russian Institute at Columbia University is contributing an analytic description of the organized bar in the U.S.S.R. He is using no questionnaires. His facts are derived from his experiences and his scholarship.

Of necessity research techniques are determined by the job to be done and by the resources available. As the Survey progresses and the Council with its committees reviews the first series of reports, further research, perhaps along different lines, may be necessary. The present organization of the Survey provides for flexibility.

III

"What is the Survey trying to prove?" is a question which requires a second thought. The first thought may well be to answer: "Nothing at all; the Survey is trying to gather facts for an objective appraisal of lawyers as they function in our democratic society." The truth is that few if any factual investigations in the social sciences can be accurately characterized as "pure," that is to say, investigations bent on finding facts about the properties of the items under scrutiny and with no thought of a practical application in any way. The Survey is not "pure" in this sense. The Director instructs report writers to state their facts first as impartially as possible, then separately discuss their constructive recommendations. No one, least of all the Director, supposes that the report writer will set out his facts, look them over thoughtfully, then deduce his conclusions on to paper as though he were adding up a column of figures with no idea what the result would be.

The topical outline of the Survey, with its Divisions and subdivisions, neither frames nor clearly indicates the underlying value-judgments to be tested by research. For all an outsider would know after looking at the organizational chart, the Survey means to conduct an elaborate census of the legal profession. It intends to do that, yes. To that extent it is "pure." Able minds after scanning the factual findings of the Survey may detect evidence for propositions which were not hypo-

5. See "Selected List of Materials on the Legal Profession," Volume 3, Number 8, The Record of the Association of the Bar of the City of New York, pp. 348-354 (November, 1948).

theses existing in the minds of Survey workers before they began their research. However, it is a fact that the Surveyors are bent on proving certain propositions, though this is not wholly realized by a few of them. If these working hypotheses are articulated at the beginning, the Survey's success in testing them, providing proof and recommending ways for advancing those that pan out, will be easier to gauge later.

The only practical mode of proving that the tentative beliefs or hypotheses stated below are operative is what the psychologists call "confrontation." That is to say, some flat assertions need no bolstering. They are self-evident. Either the proposition squares with common sense or it does not; the common sense in this case is that of the thoughtful lawyer candidly appraising his profession. The Survey personnel were not polled. The official pronouncements do not help much. The Survey's Constitution says:

"The Council is created for the purpose of conducting a Survey of the Legal Profession in the United States of America to be recorded in permanent form and to be made available to the members of the legal profession and the public. . . ."

and that the Director—

". . . shall have academic freedom to direct and report to the Council from time to time facts essential on which to found conclusions with regard to the legal profession and its various relationships to the public, social, and economic life of the United States of America."

The implication is that important issues await clarification through the efforts of the Survey. Director Smith, almost thirty years ago in his *Justice and the Poor*, stated a hypothesis with respect to the judicial treatment of poor persons in the United States. He then proceeded to depict the reality. Underlying beliefs about what the reality *should* be can be conveniently termed hypotheses, normative hypotheses to be precise, until their factual premises are established. For example, Smith could not promote the establishment of Legal Aid organizations until he proved that (1) the poor were not getting justice and (2) that Legal Aid organizations, among other things, were a practical way of helping them get it. The same mechanism is repeated in Gunnar Myrdal's monumental *American Dilemma*, published a few years ago. It also is built around a contrast of ideals and actuality.

The hypotheses set out below are at various levels of generality. Most lawyers, in spite of what their detractors may say, are against sin. Most lawyers will agree that it is unjust that a person should be deprived of his day in court because he is poor. But if the statement is made less general, say, to the effect that it is only fair that the government should pay the costs for poor persons in civil cases, the agreement vanishes and the air fills with protests, alternative suggestions and qualifications. Then interests must be "balanced." The following statements of underlying beliefs are at the most specific level possible. A few may not represent an area of implicit agreement among participants in the Survey, in which case they are propounded on the assumption that they are meant to be tested anyway.

The following beliefs, it is emphasized, do not constitute an expression of the writer's personal preferences. Rather the attempt is to report the cardinal hypotheses or theories underlying the research in each Division as inferred from the written and spoken opinions of the men who are responsible for the Survey. It is an effort to make explicit the intuitions these men are tracking down, to articulate the surmises they have harbored about lawyers. After each statement of a hypothesis, a list of the main lines of inquiry for Survey research follows in order to make its nature and challenge clearer. The belief may be likened to a beam of intuitive light whereas the factual inquiries designate a few of the shadows it must dissipate in order to illuminate the path to a more effective legal profession.

A. *Every person, rich or poor, in the United States should have access to the services of a competent lawyer.*

1. How many persons today do not have access to such services? Why?

2. Is it the duty of the government to see that this is brought about? The bar associations? How?

3. Is the average person, irrespective of income, sufficiently aware of his needs for legal services?

4. Is the person of ample means efficiently served by the lawyers who provide his legal services?

B. *A lawyer's services are very diversified.*

1. What are the common elements, if any,

in the lawyer's acquired traits and skills?

2. What are the particular traits and skills which lead to success in various specific jobs that a lawyer is asked to do?

C. *A lawyer has a professional aptitude for participation in politics and public administration, at every level and in all branches of the government.*

1. What does the lawyer as a lawyer bring to the public service?

2. How does he compare, in non-legal positions, with his lay colleagues, including the trained public administrator and political scientists?

D. *Lawyers have a duty to participate intensively in the selection of judges and in the framing of judicial rules.*[6]

1. What part is the lawyer now playing in the selection of judges and the framing of rules?

2. If he should, how can he increase his influence in these directions?

E. *Lawyers, in the main, should be the only persons allowed to practice before administrative boards.*

1. Does this kind of practice require the qualities tested by admission to the bar?

2. Are lay specialists often more competent before these boards?

F. *The law schools need a clear picture of their objectives.*

1. What subjects and processes must be taught in a law school?

2. How can clinical training be instituted, if it should be?

3. What can be done to improve the adequate law schools and to abolish the hopeless ones?

G. *Admission requirements in most states need to be raised and/or changed.*

1. What standards in which subjects and processes are appropriate for bar examinations?

2. Should the states, the law schools or the bar associations be in direct charge of the admission program?

3. Is the universal bar examination feasible? Is there a core of essential knowledge which can be tested in at least part of the examination in each state?

4. What is the relationship between the improvement of bar examination standards and the prevention of overcrowding of the bar?

H. *Lawyers, individually and in association, must enforce their ethical canons more strictly.*

1. How have discipline cases arisen and been disposed of in the past?

2. How many infractions are going by unchallenged, although known by other lawyers? How many unknown by other lawyers but, by reasonable effort, knowable?

3. How can the profession vitalize its ethics, stiffen its discipline and enforce disbarment policies for optimum effect?

I. *The application of good organizational techniques to the practice of law can result in markedly more effective and less expensive legal service.*

1. What are the present organizational techniques used by lawyers?

2. What type of organization of legal practitioners is best for both lawyer and client? How does this vary with size and type of the community, if it does?

J. *Unauthorized practice of law by banks, title companies, tax bureaus, collection agencies, etc., should be eliminated.*

1. What is the extent of this unauthorized practice?

2. On what grounds can these various activities be justified? And condemned?

K. *Improvement of the profession and its services to society can only be accomplished through the organized bar.*

1. What is the history and the extent of the organized bar?

2. What is its record of efficacy in solving professional problems?

3. What are the most feasible opportunities for improvement?

4. What can we learn from the experience of organized bars in other countries?

Although more hypotheses can be stated, these seem to be the central ones. Quite possibly they are sufficient to convince a layman that before he could tackle the job of directing the Survey he would have to do a vast amount of "acclimatizing."

It is not difficult to reason that the lawyer's role is a considerable one in our complex society, even an indispensable one. The need for

6. Judicial administration itself is not being studied by the Survey. The lawyer as a lawyer is the center of attention. An additional consideration is that a comprehensive research project on this subject, nearly ready for publication, is in the hands of the Hon. Arthur T. Vanderbilt as Chairman of the National Conference of Judicial Councils.

well trained men to make, interpret and apply our innumerable laws and regulations is plain. As long as we prefer a government of laws, not men, the lawyer's job is bound to be crucial. The mission of the Survey is to find facts about lawyers in our society and to subject those facts to the analysis of the most competent men, who may or may not be lawyers. The realization that both the search and the analysis are powerfully affected by consciously and semi-consciously held hypotheses or theories, similar if not identical to the ones stated above, aids in understanding why lawyers must be in command of a study of lawyers. More significantly, this awareness will assist the Survey participants to find the facts that will be useful in prompting and shaping change where it is necessary.

When the Survey has completed its assignment, there will yet be a vast amount of undone research on these topics. It is not likely that the Survey will uncover adequate evidence to support each of the above stated hypotheses, thus providing a background for constructive remedial action in every instance. Whatever the outcome, the legal profession is honor bound to persevere in its self-examination and to continue matching the *ought to be* with the *is*, seeking and welcoming non-lawyer assistance at every stage.

For many centuries the doctor has been confronted with the challenge, ofttimes derisive, "Physician, heal thyself!" The lawyer, with his vaunted prowess in organizing human complexities and settling vexatious disputes, is with equal aptness enjoined, "Lawyer, counsel thyself." The Survey of the Legal Profession is a collective venture to do just that.

The Case for the Special Verdict

By JEROME N. FRANK

On January 19, 1945, a car repairman named Buzzy Skidmore was injured in the Baltimore and Ohio yards at Lorain, Ohio. A New York federal jury awarded him $30,000 damages, and the defendant railroad appealed, charging, among other things, that the trial court had erred in denying its request for a special verdict. Judge Frank, speaking for the Court of Appeals for the Second Circuit, felt obliged to affirm, but did not dismiss the subject until he had delivered the following excellent discussion of special verdicts and their possibilities, which we gladly reprint as a notable addition to the literature on jury trial and its improvement. Judge Frank's original footnotes, 64 in number, exceed the text in volume and had to be omitted for lack of space here. We have included only certain ones of bibliographical value, without quotations. For the full opinion and its annotations, see *Skidmore* v. *Baltimore and Ohio R. Co.*, 167 F. 2d. 54-70, decided March 15, 1948.

UNDENIABLY, the verdict affords no satisfactory information about the jury's findings. But almost every general verdict sheds similar or even greater darkness. Such verdicts account for much (not all) of the criticism of the civil jury. Some revaluation of the jury system seems not unjustified in the light of the fact that ours is the only country in the world where it is still highly prized. Lauded as essential to individual liberty and democracy, and imported in the late eighteenth and nineteenth centuries from England and the United States, trial by jury was adopted in criminal cases on the European continent, but subsequently ceased there, in pre-Hitler days, to maintain its popularity. Nor can that attitude be explained as a symptom of decreased interest in democracy and individualism. For Scotland, surely long a land of liberty-loving individuals, having in the sixteenth century virtually rejected the civil jury, re-adopted it in 1815, and, still later, all but gave it up. In England, whence trial by jury came to us, it is now seldom employed in civil suits, has been abandoned in criminal prosecutions other than for major crimes and even there is used de-

creasingly. In the United States, the number of jury-waivers indicates the jury's slowly waning popularity. But here especially in the federal courts, the civil jury, in many cases, cannot be eliminated except by constitutional amendments. We must, then, as to some kinds of cases, assume that it will long be with us.

SPECIAL VERDICT NOT A NOVELTY

But what many persons regard as its major defects can be mitigated. One device which will help to achieve that end is the special or fact verdict. Those who resent any reform which invades the jury's province should be reassured by the historians who teach that the special verdict is no new-fangled idea, but one almost as old as the jury itself, older indeed than the modern jury. In those early days, Morgan tells us, jurors often successfully insisted upon the right to render such verdicts against the desires of the judges who wanted general verdicts.[1] To be sure, in this country, during the latter part of the eighteenth and the early part of the nineteenth centuries, the right to return a general verdict was highly esteemed as the jury's prerogative, especially in criminal cases; the judges then instructed the juries that they were to decide both "the law" and the facts, not being bound by the opinion of the trial judge.[2] Most jurisdictions later repudiated that doctrine. The courts and legal writers declared that, if juries had the right to ignore the judges' instructions as to the applicable legal rules, the "law" would "become as variable as the prejudices, the inclinations and the passions of men"; "the parties would suffer from an arbitrary decision"; "decisions would depend entirely upon juries uncontrolled by any settled, fixed, legal principle," and would be "according to what the jury in their own opinion suppose the law is or ought to be"; our "government" would "cease to be a government of laws and become a government of men"; "jurors would become not only judges but legislators as well"; the "law" would "be as fluctuating and uncertain as the diverse opinions of different juries in regard to it"; jurors would be "superior to the national legislature, and its laws * * * subject to their control" so that a "law of Congress" would "be in operation in one state and not in another."[3]

Yet no amount of brave talk can do away with the fact that, when a jury returns an ordinary general verdict, it usually has the power utterly to ignore what the judge instructs it concerning the substantive legal rules, a power which, because generally it cannot be controlled, is indistinguishable for all practical purposes, from a "right". Practically, then, for all we may say about the jury's duty when it renders a verdict, we now do have the very conditions which we were warned would result if the jury had the right to decide legal propositions: cases are often decided "according to what the jury suppose the law is or ought to be"; the "law," when juries sit, is "as fluctuating and uncertain as the diverse opinion of different juries in regard to it"; and often jurors are "not only judges but legislatures as well."[4] Indeed, some devotees of the jury system praise it precisely because, they say, juries, by means of general verdicts, can and often do nullify those substantive legal rules they dislike, thus becoming *ad hoc* ephemeral (un-elected) legislatures (a state of affairs singularly neglected by most writers on jurisprudence, who would do well to modify their ideas by recognizing what might be called "juriesprudence"). Surprisingly, that sort of defense of the general verdict is not seldom voiced by lawyers who, in the next breath, demand strict adherence to the legal precedents.

UPON WHAT IS GENERAL VERDICT BASED?

"Competent observers", writes Judge Rossman, "who have interviewed the jurors in scores of jury trials, declare that, in many cases where the general verdict was employed, principal issues received no consideration whatever from the jury."[5] The general verdict, then, has some strange characteristics. As Sunderland puts it:

"The peculiarity of the general verdict is the merger into a single indivisible residuum of all matters, however numerous, whether of law or fact. It is a compound made by the jury which is incapable of being broken up into its constituent parts. No judicial reagents exist for

1. Morgan, "A Brief History of Special Verdicts and Special Interrogatories," 32 Yale L. J. 575, 588 (1923).

2. Howe, "Juries as Judges of Criminal Law," 52 Harv. L. Rev. 582 (1939).

3. See *Sparf and Hansen* v. *U. S.*, 156 U. S. 51 (1894).

4. See Wigmore, "A Program for the Trial of Jury Trial," 12 J. Am. Jud. Soc. 166 (1929); Pound, "Law in Books and Law in Action," 44 Am. L. Rev. 12 (1910).

5. Rossman, "The Judge-Jury Relationship in the State Courts," 3 F. R. D. 98, 108 (1944).

either a qualitative or a quantitative analysis. The law supplies the means for determining neither what facts were found, nor what principles of law were applied, nor how the application was made. There are therefore three unknown elements which enter into the general verdict; (a) the facts; (b) the law; (c) the application of the law to the facts. And it is clear that the verdict is liable to three sources of error, corresponding to these three elements. It is also clear that if error does occur in any of these matters it cannot be discovered, for the constituents of the compound cannot be ascertained. No one but the jurors can tell what was put into it and the jurors will not be heard to say. The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi. Both stand on the same foundation —a presumption of wisdom. The court protects the jury from all investigation and inquiry as fully as the temple authorities protected the priestess who spoke to the suppliant votary at the shrine. It is quite probable that the law is wise in not permitting jurors to testify as to how they compounded their verdict, for all stability would disappear if such inquiries were open. * * *

"As to the second element in the general verdict, the *law*, it is a matter upon which the jury is necessarily ignorant. The jurors are taken from the body of the county, and it is safe to say that the last who would be called or allowed to sit would be a lawyer. They are second-hand dealers in law, and must get it from the judge. They can supply nothing themselves; they are a mere conduit pipe through which the court supplies the law that goes into the general verdict. But while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misundertand more law in a minute than the judge can explain in an hour. Indeed, can anything be more fatuous than the expectation that the law which the judge so carefully, learnedly and laboriously expounds to the laymen in the jury box become operative in their minds in its true form? One who has never studied a science cannot understand or appreciate its intricacies, and the law is no exception to this rule. The very theory of the jury and its general verdict is thus predicated upon a premise which makes practically certain an imperfect or erroneous view of the principles of law which are to be compounded into the verdict. The instructions upon the law given by the court to the jury are an effort to give, in the space of a few minutes, a legal education to twelve laymen upon the branch of the law involved in the case. Law cannot be taught in any such way. As to this element, accordingly, the general verdict is almost necessarily a failure.

"The general verdict is as inscrutable and essentially mysterious as the judgment which issued forth from the ancient oracle of Delphi."

"As to the third element in the general verdict—*the application of the law to the facts*, we find the same difficulty as in the case of the first element—a merging of the law into the verdict in such a way that it is impossible to tell how or whether the jury applied the law. They may have applied it in a wholly wrong way, or they may have failed to apply it at all. No analysis of the verdict can be made which will throw any light on the process. Since the case can ordinarily go to the jury only if a verdict either way is legally possible, whatever the jury does is presumed to be right, and this presumption excludes any inquiry from the jurors themselves. Cases may arise where the verdict shows on its face a failure to properly apply the law, usually as relating to the measure of damages, but in the vast majority of cases the verdict is a complete mystery, throwing a mantle of impenetrable darkness over the operations of the jury. Whether the jurors deliberately and openly threw the law into the discard, and rendered a verdict out of their own heads, or whether they applied the law correctly as instructed by the court, or whether they tried to apply it properly but failed for lack of understanding,—these are questions respecting which the verdict discloses nothing. So far, therefore, as the third element goes, the general verdict is an unknown and unknowable mystery, with the balance of probability against it. * * *

"We come, then, to this position, that the general verdict * * * confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the

issues, and by shrouding in secrecy and mystery the actual results of its deliberations. * * * The record must be absolutely flawless, but such a result is possible only by concealing, not by excluding mistakes. This is the great technical merit of the general verdict. It covers up all the shortcomings which frail human nature is unable to eliminate from the trial of a case. In the abysmal abstraction of the general verdict concrete details are swallowed up, and the eye of the law, searching anxiously for the realization of logical perfection, is satisfied. In short, the general verdict is valued for what it does, not for what it is. It serves as the great procedural opiate, * * * draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable."[6]

TRYING PERSONALITIES INSTEAD OF ISSUES

The general verdict enhances, to the maximum, the power of appeals to the biases and prejudices of the jurors, and usually converts into a futile ritual the use of stock phrases about dispassionateness almost always included in judges' charges. Many books on trial tactics, written by experienced trial lawyers, which give advice as to how to arouse juries' emotions, make the point that a jury tries the lawyers rather than the case, and that the lawyers, in jury trials, must recognize themselves as actors or stage-managers engaged in theatrical performances. In a series of pamphlets on trial practice, recently published under the auspices of the American Bar Association, one author writes that "the advocate * * * must always recognize that the jury is judging the lawyer as well as the witnesses, quick to take sides because of the protagonists rather than their opinion of the testimony"; another says that the jurors' reaction to trial counsel "may be more important than the reaction to the client, for the client appears on the stand only during a relatively brief period, while the lawyer is before the jury all the time;" this same author gives detailed suggestions of means by which a lawyer may "ingratiate himself" with the jury. A court has solemnly decided that "tears have always been considered legitimate arguments before a jury," that such use of tears is "one of the natural rights of counsel which no court or constitution could take away,"

"The general verdict enhances to the maximum the power of appeals to the biases and prejudices of the jurors. Books on trial tactics make the point that a jury tries the lawyer rather than the case and that the lawyers, in jury trials, must recognize themselves as actors or stage-managers engaged in theatrical performances."

that "indeed, if counsel has them at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises. * * *" Harris, in his well known book on advocacy, says, "It may be that judgment is more easily deceived when the passions are aroused, but if so, you [the lawyers] are not responsible. Human nature was, I presume, intended to be what it is, and when it gets into the jury-box, it is the duty of the advocate to make the best use of it he fairly can in the interests of his client."[7] This is no laughing matter. For prejudice has been called the thirteenth juror, and it has been noted that "Mr. Prejudice and Miss Sympathy are the names of witnesses whose testimony is never recorded, but must nevertheless be reckoned with in trials by jury."

Small wonder that Thayer commented that jury trials are "a potent cause of demoralization to the bar," or that Morgan, well versed in trial tactics, in reviewing a book on jury trial techniques, recently wrote: "If only some lawyer could rise up and honestly

6. Sunderland, "Verdicts, General and Special," 29 Yale L. J. 253 (1920).

7. See Gair, *The Trial of a Negligence Action* (1946), p. 36; Bodin, *Selecting a Jury* (1945), pp. 50 ff.; Hays, *Tactics in Cross Examination* (1946), pp. 18 ff.; Harris, *Hints on Advocacy* (1943) Ed.), p. 275.

denounce Mr. Goldstein as a defamer of his profession. * * * If only a reviewer could assert that this book is a guide not to the palaces of virtue but to the red-light districts of the law. But a decent respect for the truth compels the admission that Mr. Goldstein has told his story truly. He has told it calmly, without a pretense of shame and [God save us!] without the slightest suspicion of its shamefulness. He has shown by his own unperturbed frankness with what compliance the profession, which would smile the superior smile of derision at the suggestion of a trial by battle of bodies, accepts trial by battle of wits. In all innocence, he has produced a volume which is a devastating commentary upon an important aspect of our administration of justice." Not that lawyers, trying to protect their clients, should be censured for employing the strategems described in such a book—as long as we retain the general-verdict jury system. But, with the general verdict in operation, and those strategems as its usual concomitants, it should not be surprising that one of the members of this court said, "I am by no means enamored of jury trials, at least in civil cases * * *", and that Mr. Justice Cardozo, speaking for the Supreme Court, remarked, "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without" trial by jury.[8]

That is not to say that, by way of contrast with juries, all trial judges are free of all susceptibility to emotional appeals, or that—although most trial judges, because of experience, are more skilled in fact-finding than juries and better armored against the seductive wiles of lawyers—any trial judge can (or should) slough off all predilections. Lord Bramwell observed, "One third of a judge is a common law juror if you get beneath his ermine"; and Mr. Justice Riddell added that "the other two thirds may not be far different." Nor is it to say that, where constitutional or statutory provisions require jury trials, judges do not have the highest obligation to see that such trials are conducted in accordance with the basic principles which govern such proceedings. But, as reasonable modifications of the jury system are not thereby precluded, a vigorous revival of a traditional adjunct of that system, i. e., the special verdict, represents no deviation from judicial obligations.

8. *Palko v. Connecticut*, 302 U. S. 319, 325 (1937).

UNDERSTANDING THE JUDGE'S INSTRUCTIONS

Perhaps the least desirable feature of the general verdict, a feature which the fact verdict wipes out, is this: The theory of the general verdict involves the assumption that the jury fully comprehends the judge's instructions concerning the applicable substantive legal rules. Yet, often the judge must state those rules to the jury with such niceties that many lawyers do not comprehend them, and it is impossible that the jury can. Judge Bok notes that juries have "the disadvantage * * * of being treated like children while the testimony is going on, but then being doused with a kettleful of law during the charge that would make a third-year law student blanch." Nevertheless, the patently fictitious assumption that the jurors have more legal wisdom than third-year law-students requires the upper court to reverse when a trial judge fails to state the pertinent substantive rules with sufficient particularity. Such faulty instructions, it has been said, "are the greatest single source of reversible error." Judge Rossman says: "The general verdict is responsible for the elaborate instructions given to the jury. * * * The necessity for [these] instructions creates pitfalls which may trap the trial judge and which in turn may result in new trials, appeals and reversals." In many instances, such a reversal means merely another trial at which the judge will intone to another uncomprehending jury a revised version of those legal rules. There results an enormous waste of time and money. Indeed, the prospect of a prolonged new trial undoubtedly often induces a litigant of modest means to accept an unfair settlement. The fact verdict provides an obvious escape from these wasteful or unfair consequences of the general verdict.

The finding of facts, says Sunderland, "is much better done by means of the special verdict. Every advantage, which the jury is popularly supposed to have over the court as a trier of facts, is retained, with the very great additional advantage that the analysis and separation of the facts in the case which the court and the attorney must necessarily effect in employing the special verdict, materially reduces the chance of error. It is easy to make mistakes in dealing at large with ag-

gregates of facts. The special verdict compels detailed consideration. But above all it enables the public, the parties and the court to see what the jury has really done. * * * The morale of the jury also is aided by throwing off the cloak of secrecy, for only through publicity is there developed the proper feeling of responsibility in public servants. So far, then, as the facts go, they can be much more effectively, conveniently and usefully tried by abandoning the general verdict and substituting the special verdict. * * * The special verdict is devised for the express purpose of escaping the sham of false appearances."

When using a special verdict, the judge need not—should not—give any charge about the substantive legal rules beyond what is reasonably necessary to enable the jury to answer intelligently the questions put to them. As, accordingly, the jury is less able to know whether its findings will favor one side or the other, the appeal to the jurors' cruder prejudices will frequently be less effective. "A perverse verdict may still be returned, granted a jury clever enough to appreciate the effect of its answers, and to shape them to harmonize with its general conclusions. But it is much more difficult * * * and by requiring the jury to return the naked facts only we may fairly expect to escape the results of sympathy, prejudice and passion."[9] That may be too sanguine a hope; but the fact verdict may often reduce the more undesirable sway of emotions. It is suggested, too, that a special verdict "searches the conscience of the individual juror, as a general verdict does not," because "such are the contradictions in human nature that many a man who will unite in a general verdict for a large and unwarranted sum of money will shrink from a specific finding against his judgment and sense of right and wrong." Judge Rossman writes, "Bearing in mind that in the judge-jury relationship both members of the team are entitled to fair treatment, may we not ask ourselves: Is it fair to require a jury to employ a general verdict? Since recourse to the special verdict is available, is it right to demand that a juror swear that he will obey the instructions (which the lawyers frequently say they are not sure of until they have been transcribed) and return a general verdict in obedience thereto?"

9. Clementson, Special Verdicts and Special Findings by Juries (1905), p. 12.

SUCCESS IN THREE STATES

True, the common-law type of special verdict, when utilized in this country, frequently caused so many complications that it fell into disrepute. But in three states, North Carolina, Wisconsin and Texas, the special-verdict practice in civil cases was so modified as to avoid most of those complications. The Wisconsin and Texas procedures, apparently the most effective, seem to have been the model for Rule 49 (a) of the Federal Civil Rules of Procedure, 28 U. S. C. A. following section 723c, which authorizes the trial judge to dispense with a general verdict and, instead, to require the return of special written findings. Rule 49 (b) also authorizes the judge to call for a general verdict accompanied by written interrogatories.[10] But, unlike the Texas trial judge, the federal district judge, under the Rule, has full, uncontrolled discretion in the matter: He may still require merely the old-fashioned general verdict.

Accordingly we cannot hold that a district judge errs when, as here, for any reason or no reason whatever, he refuses to demand a special verdict, although we deem such a verdict usually preferable to the opaque general verdict. Perhaps some day soon Rule 49 will be amended to make compulsory either special verdicts or written interrogatories in civil jury cases. Meanwhile, we can but hope that, in such cases, the district judges will require one or the other, on their own motion or when asked to do so.

The fact verdict will furnish no panacea. Among other things, as previously noted, it will still be true that, in a relatively simple case, the jury will still be able to foresee what answers to the questions will produce a judgment for the side it favors. There is this, too, to consider: Some persons oppose the requirement that trial judges in non-jury cases shall file special findings of fact. As such findings closely resemble a jury's special verdict, it is therefore pertinent here that some of those opponents suggest, in effect, that a trial judge's decision is a unique composite reaction to the oral testimony, a composite which ought not—or, rather, cannot without artificiality—

10. As to interrogatories, see Wicker, "Special Interrogatories in Civil Cases, 35 Yale L. J. 296 (1926); Green, *Judge and Jury* (1930), pp. 354-55.

be broken down into findings of fact and legal conclusions. Back of this suggestion there lurks something like the notions of gestalt psychology: A judge's reaction to the evidence at a trial is apparently considered a "whole" (a "gestalt" or "pattern") which cannot adequately be analyzed. Separation of a decision into "law" and "fact" components, it seems to be asserted, will be "too logical," in the sense that it excludes the "intuition of experience which outruns analysis and sums up many unnamed and tangled impressions, impressions which may lie beneath consciousness without losing their worth." Some support for this position might be sought in recent writings to the effect that logic stems from language which, in turn, because of its inherent character, cannot fully express or symbolize "feelings," and that feelings have a rational validity expressive of "wordless knowledge," which must not be disregarded. While, on net balance, however, a logical assaying by a trial judge of his decision has immense value, so that in a non-jury case special findings of fact by a trial judge are eminently desirable, the argument against special findings of fact by trial judges might perhaps be applied with somewhat greater effectiveness against fact verdicts by juries: It might be said that some *one* person or body, either a trial judge or a jury, should be entrusted in each case with reaching a composite reaction to the evidence, and that therefor a division of functions into explicit fact-finding by a jury and "law-finding" by a judge will yield an undesirable artificiality. Nonetheless, even assuming that that argument has some cogency, fact verdicts seem clearly better than general verdicts.

What the Courts Are Doing to Improve Judicial Opinions

By MRS. MARY K. WALL

AT THE MEETING of the American Bar Association in Seattle in September, 1948, one afternoon's program of the Section of Judicial Administration was devoted to the subject of improving judicial opinions. Associate Justice Gordon Simpson of the Supreme Court of Texas was chairman of the committee which arranged the program. The survey here reported on was made by Judge Simpson in connection with his chairmanship of that committee.

During the latter part of May, 1948, Judge Simpson wrote the following letter to the presiding judge (chief justice, senior judge, etc.) of each state and federal appellate court in the United States:

"The afternoon program on September 6, 1948, of the Section of Judicial Administration of the American Bar Association at its Seattle convention will be devoted to the general subject of employing better English in court opinions and abbreviating opinions as much as is consistent with accuracy and clearness. I would like to report to that meeting any measures which our appellate courts may have taken in this field and, particularly, any system of editing opinions to attain either or both of these objectives which may have been evolved. May I trouble you to write me what is the situation in this regard in your court?"

The letter was sent to 115 judges.[1] Sixty-six replies were received.

While the letter asked for information as to any "system of editing opinions," it was intended as an effort to elicit information and not to advocate a necessity for a fixed, inflexible "system." The letter did not attempt to

MRS. MARY K. WALL is a member of the Texas bar, and secretary to Associate Justice Gordon Simpson of the Supreme Court of Texas. The opening paragraphs explain the origin and nature of the article. Mr. Justice Simpson has written the following supplementary explanation regarding its authorship: "What actually happened was that I went overseas and was so completely out of touch last summer that I did not and could not do anything about summarizing the content of the letters which so many presiding judges and chief justices had written. Mrs. Wall undertook the task in my absence, and the article was solely the product of her fashioning."

1. The courts adressed were as follows: The Supreme Court of the United States, 10 federal circuit courts of appeals and the Court of Appeals for the District of Columbia, the Court of Customs and Patent Appeals, the Municipal Court of Appeals for the District of Columbia, 52 state courts of highest resort (including Court of Chancery in Delaware and New Jersey, Criminal Court of Appeals in Oklahoma, Court of Criminal Appeals in Texas, and two divisions of the Supreme Court of Mississippi), and 49 state intermediate appellate courts.

define what the writer meant by "better English." However, it can be assumed that Judge Simpson had in mind not only correct grammatical construction, but also a broader concept of accurate choice of words, careful sentence structure, logical organization of ideas, and understandable presentation of subject matter.

LANGUAGE AND STYLE

Practically all of the judges who expressed a view believed that opinions generally should be shorter than they are, and that their quality could be improved. However, there were few concrete suggestions as to how these objectives could be accomplished. Justice Annette Abbott Adams of California found words to voice the sentiments of many when she wrote:

"The end sought by your committee is undoubtedly 'a consummation devoutly to be wished.' But to quote Shakespeare, 'If to do were as easy as to know what were good to do, chapels had been churches and poor men's cottages princes' palaces. It is a good divine that follows his own instructions: I can easier teach twenty what were good to be done, than be one of the twenty to follow mine own teaching.'"

As to what actually is being done, the prevailing practice is epitomized in this reply: "The accomplishment of these measures is left to the individual judge and not to any system of editing or formal measures."

Most of the writers who discussed improvement of the quality of opinions regarded it as a matter for each individual judge: he should be left free to express himself as he thinks best and should not have his writings subjected to revision and editing in material respects.

Some of the judges were of the view that their court opinions fulfilled adequate standards for correct and concise expression, and pointed out that the educational background of the members of their courts as now constituted assured good quality in writing. Others ventured the observation that their opinions could be improved, but thought that each judge would have to correct his own shortcomings. One federal circuit judge wrote:

"We recognize that the question of style is a matter primarily for the judge who writes the opinion, and my own view is that it is not wise for the judges who do not write the opinion to insist upon their own ideas as to style and expression. This would result in a mere barren quibbling over words. The best that can be done is for the court to lay down certain standards as to brevity, clearness, etc., and leave it to the judge who prepares the opinion to apply the standards."

Judge S. L. Felts of the Tennessee Court of Appeal agreed that the solution must lie with the individual judge. "The problem," he went on to say, "is basically one of skill in the art of writing and there are no shortcuts to that." Judge Felts called attention to a recent book, *The Art of Plain Talk*, by Rudolf Flesch (Harper), which he thought every lawyer and every judge would do well to read. Certainly that book points out many of the common faults of legal writings.

In quite a number of courts the colleagues of the opinion writer make a practice of offering suggestions and criticisms as to style. Doubtless in all of the courts an opinion is *subject* to criticism not only as to principles of law announced but also as to form and manner of expression. One judge, for instance, stated that in their court conferences "everything in the opinion from commas to rationale and judgment is subject to criticism." Just how effective this scrutiny would be depends upon the concern felt by the members of the court for the objectives under discussion, as well as upon the temperaments of the individual judges and the working habits of the court.

In many courts apparently there is a feeling that the opinion writer is responsible for the quality and form of the opinion, and that the court as a whole is responsible only for the holdings announced in it. As one judge put it, "With us each judge is the architect of his own opinions." Indeed, the opinion writer himself frequently looks upon the responsibility in this manner. One judge wrote, "I suppose there would be resentment on the part of some members if the text of their opinion would be presumed to be tampered with." On the other hand, the chief judge of one court wrote: "We have left that though the author of an opinion should have considerable leeway in expressing himself as he personally thinks best he is after all writing for the court and that all three members of the court should have a voice in the make-up of every opinion."

In about a third of the courts the reporter of opinions exercises a certain amount of editorial supervision. In most instances the reporter's suggestions or changes are probably limited to the mechanics of punctuation, capitalization, form of citations, etc., and to the

correction of obvious grammatical errors; he would not undertake to suggest other changes which might improve the quality of the opinion. It is not likely that the reporter's editorial supervision often exceeds that described by one state chief justice:

"After the opinion is finally approved by the court, it goes to the reporter before it is made public. He edits the opinion for accuracy as checked by the record, for any mistakes or obscurity in expression that may have crept in, and for uniformity in the use of certain words and forms of expression that have become standardized in our decided cases. He would hardly take it upon himself, however, to recast an opinion or to suggest substantial alterations."

In our own court [the Supreme Court of Texas]—and this is probably the practice generally—the reporter is not furnished with a copy of the opinion until after it is adopted by the court, and at that stage it is rather awkward to undertake substantial revisions in an opinion. In a few courts, however, the reporter assists in shaping the opinions, both as to grammar and sentence structure, before they are handed down. One chief justice wrote:

"We have a very efficient reporter and a reporter's clerk who is a stickler for the principles of good writing. We permit them and they take the liberty of thoroughly editing our opinions, calling the attention of the judge concerned, however, to any very material changes. When I chance to see an opinion of mine as it finally leaves their hands, I am always amazed at the number of minor corrections which have been made. As, however, the result is a good deal better English than I would naturally use, I certainly have no complaint to make."

In California the reporter has prepared a style manual as a guide for the preparation and publication of opinions. "This manual covers some rules of grammar and style, but it was designed primarily to aid in securing uniformity in capitalization, punctuation, citations and other similar matters," wrote the Chief Justice of the California Supreme Court.

Several judges mentioned that their law clerks and secretaries are encouraged to make suggestions and criticisms, and in at least two courts an executive secretary edits all opinions before they are adopted.

LENGTH OF OPINIONS

The answers to Judge Simpson's inquiry revealed more concern for shortening opinions than for improving their literary merit. Although a few courts apparently have attained a brevity satisfactory to their members, most judges expressed the view that opinions generally are longer than they should be.

The problem of reducing the bulk of opinions was discussed from two standpoints: (1) Nonpublication of opinions of no precedential value, and (2) shortening opinions by eliminating the recitation of immaterial facts, long discussions of already firmly established legal principles, lengthy citations of authorities, etc. In a way the shortening of opinions is also related to the improvement of their quality, for a concise, carefully pruned opinion is usually more intelligible than one which is rambling and loosely put together.

As in style of writing, here, too, the judges felt improvement must come from the judge who writes the opinion. Chief Justice Robert G. Simmons of the Nebraska Supreme Court wrote: "There are ways of abbreviating opinions, cutting out extensive quotes, etc., but it is a matter of education of the judge in his own personal habits of writing and expression."

Unquestionably clarity rather than brevity should be the dominant aim of the opinion writer; and in some cases a too greatly abbreviated opinion would become unintelligible. In this vein Chief Justice Wm. M. Maltbie of the Connecticut Supreme Court of Errors observed:

"My personal views, for what they are worth, are that very often to endeavor to write a brief opinion results in the production of one which read a year or two later is most difficult to understand, and the prime difficulty today is not the length of opinions but the immense number which are reported, including not only courts of last resort, but various appellate divisions and even trial courts. I think it is much better to have an opinion which clearly discloses the grounds upon which it rests and is made to fit into the general structure of law than to attempt to see how briefly one can decide the immediate question involved in the case at hand."

Judge Minor Moore of the California District Court of Appeal at Los Angeles made this comment:

"From a study of some decisions it seems that the authors can never agree upon just exactly how much should be included in order to clarify the principles enunciated and to interpret the facts and the law involved. Many excellent opinions reiterate declarations of principles that have become commonplace; many

insert sufficient bibliography to tax the Los Angeles County Law Library, which contains everything. In each instance I assume the author must feel that by such repetition and by citing many authorities he not only gives support to his conclusions, but gives to them the orthodox tinge."

Several judges expressed regret at their seeming inability to write opinions as short as they would like, and some suggested that a lack of time frequently contributed to this failure. One judge wrote slyly: "You perhaps have heard the old saw of the attorney who apologized for having filed a long brief because he did not have time to write a short one. I fear that is the trouble with me, but I would not dare make such a remark about the other members of our court." And several observed that when a judge complains of the length of opinions, usually he is talking about the opinions written by other judges and not himself.

But long opinions with some judges are deliberate. In jurisdictions having intermediate appellate courts the opinion of the intermediate court is likely to be in the nature of a brief for the higher court. Two presiding justices of California Courts of Appeal stated that this was true of their opinions; and it is also the case with some of the intermediate appellate opinions in Texas. On the other hand, the chief judge of the Municipal Court of Appeals for the District of Columbia said that the judges of that court had felt that since theirs was an intermediate court they should be careful not to write lengthy opinions.

One judge found some justification for lengthy opinions. He wrote:

"I have wished many times that I could express myself with brevity, but I have noticed that brief, pungent opinions many times are followed with sharp, critical petitions for rehearing. I do not deem length a fault if a full discussion has a tendency to make the parties feel that the court attempted earnestly to do justice."

Chief Justice James W. McClendon of the Texas Court of Civil Appeals at Austin expressed the belief that one factor contributing to long opinions is criticism of members of the bar, if in their own cases the record and the applicable legal principles are not elaborately reviewed.

Out of interest inspired partly by an address of Mr. Charles A. Beardsley[2] before the Illinois and Chicago Bar Associations in 1939, Mr. Herbert Bebb, a member of the Illinois bar, made an analytical study of the length of opinions written by the appellate judges of that state, which was published in the John Marshall Law Quarterly for March, 1943.[3] Mr. Bebb stated as his thesis "that unreasonable wordiness, while not a touchstone in individual cases tends to be an indication of confused thinking—that the opinions of judges who persistently and in comparable cases occupy more space per case than their fellows should be suspected of other faults." In commenting upon this article, one Illinois judge wrote: "Although no specific action was taken as a result of the article, each justice of the court examined his own work more carefully with a view to shortening the opinions, and, incidentally, to watching the English used."

Judges in several other states called attention to articles in their bar journals and law reviews on shortening opinions, indicating that there is a fairly widespread awareness of a need for reducing the length of opinions. In recent years the subject has also been discussed in various judicial conferences, notably in federal circuit conferences. Circuit Judge John Biggs, Jr. of Philadelphia wrote that a committee was to report to their circuit conference in July, 1948, on the subject of judicial opinions and their improvement.

Although this survey was not concerned primarily with the curtailment of the volume of law reports, it may be observed that the letters reflected a noticeable movement for reducing the bulk of published opinions. It seems to be the feeling generally that a full publication of opinions of no precedential value is a waste of space and effort. A number of states have adopted laws permitting the publication of memorandum and abstract opinions; and some courts are authorized to withhold from publication altogether the opinions which contribute nothing to the jurisprudence of the state.

2. As president of the American Bar Association in 1939-40, Mr. Charles A. Beardsley, of Oakland, California, vigorously advocated shorter opinions. See, for example, his address, "Legal Draftsmanship," in 26 *American Bar Association Journal* (Jan. 1940) p. 3. He was a principal speaker at the Seattle program in September, 1948.

3. Herbert Bebb, "Spade Work on Long Opinions," in 8 *John Marshall Law Quarterly* (March 1943) p. 306.

Survey of State Bar Finances

The following table contains information regarding the general finances of state bar associations. It is recommended that these tables be read in conjunction with the table on state bar membership which was published in the last issue of the JOURNAL. (32 J. Am. Jud. Soc. 121, December, 1948.) Any person who does not have a copy of the December JOURNAL may obtain one free upon request.

Unless otherwise indicated the information contained in this table was obtained from state bar officers who completed questionnaires addressed to them on the various subjects covered. The information on individual dues is up to date as of going to press, while the information on "Income Other Than Dues" is based on the 1947 fiscal years of the respective bars, 1947 being the latest year on which fairly complete information is available. In some cases in which statistics have been unavailable, we have endeavored to supply the missing information in some measure by estimates based on information which has been available. Any estimates have been indicated as such in the footnotes.

As noted in the footnotes in more detail (in connection with individual dues), only four states—Colorado, Minnesota, Rhode Island, and Wisconsin — reported sustaining memberships, while only six—Illinois, Iowa, Minnesota, New Jersey, New York, and Pennsylvania—reported life memberships.

It is very difficult to reduce figures from so many different sources, arrived at by diverse procedures and interpretations, to a common level where they may be presented together without misleading or misinforming the reader at some point or other. The large number of explanatory footnotes below indicates our effort to do so, but some flaws doubtless remain, and corrections will be welcomed and printed in a subsequent issue.

NOTES TO TABLE ON OPPOSITE PAGE

* Integrated bar.

1. Inactive membership.
2. Interest.
3. Every member of the state association, other than non-resident members, must belong to his local association. At present, members of the state bar association who are not members of affiliated associations pay $6.00 annually. Effective July 1, 1949, the annual dues of regular members will be $15.00.
4. Sustaining members — $25.00 annually.
5. Law students—$1.00 annually.
6. Commission of Bar Examiners' fees—$77,800; miscellaneous—$1,800.
7. Of this amount, $6,023.25 is derived from dues, of which amount sustaining members contribute $1,000.00. The estimated annual revenue for 1949-50, in view of the increase in dues effective July 1, 1949, to $15.00 per regular member annually, will be approximately $15,000.00.
8. This is our unverified estimate, based on other information furnished to us.
9. No money has been turned over to the association from the endowment fund.
10. Student Loan Commission.
11. The Bar Association of Hawaii has 220 members, of whom five are honorary members.
12. Although this fee is paid as a license tax to the state, the act creating the Idaho State Bar contains a continuing appropriation clause appropriating all money so received for the purposes of the State Bar.
13. Examination fees.
14. Life membership—$200.00.
15. Non-residents and associates — $5.00.
16. Revised Statutes (Biennially).
17. Life Membership Fund (1916)—$12,000; Illinois Bar Pension Foundation (1916) — $50,000;; Illinois State Bar Association Headquarters Trust (1948)—$1,000. Total $63,000.
18. Income from Life Membership Fund.
19. Life membership—$200.00.
20. Iowa State Bar Foundation: Initial goal — $50,000; long-range goal — $500,000. Organized 1944-5.
21. No information received.
22. George R. Nutter Fund. (Legacy).
23. The asssociation receives the interest from the trust.
24. Insufficient to cover cost of publication of bar journal. Publication was recently put on a monthly basis for the first time, but it is too early to tell what effect this will have on advertising revenue.
25. Michigan State Bar Foundation, organized 1948.
26. Minnesota State Bar Foundation, organized 1932.
27. Does not include the $4,500 advertising revenue.
28. Of the $12.00 annual fee, $4.00 goes to a separate disciplinary organization.
29. Some members are exempted from the payment of dues.
30. Application for admission fees—$2,105; penalties—$154.
31. Income from sale of life memberships is invested and interest only is used.
32. Members who have practiced over five years and who are over 36 years of age, pay $10.00 per year. Members with less than five years' practice, pay $5.00 per year. Members under 36 years of age with more than five years' practice, pay $8.00.
33. State license fee — $10.00, of which $2.50 goes to the state bar.
34. In addition to $2.50 per member per year received from the state license fee, a 1947 law provides that $2.50 of each filing fee in district and probate courts shall be turned over monthly to the bar association. It is estimated that this will provide approximately $12,000 revenue annually.
35. Miscellaneous income.
36. Registration fees—$3,360; examination fees—$1,425; admission on motion fees—$1,880; temporary permits—$225; banquet tickets at annual meeting—$1,194. Total $8,084.
37. Of this total $30,666 was received from dues.
38. Bar admission fees—$5,000; miscellaneous income—$260.
39. Pennsylvania Bar Association Endowment, organized 1947.
40. Total receipts from license fees—$6,124; reinstatement fees and penalties—$60; bar examination fees—$1,685; tickets at annual meeting—$1,262; bond interest—$25. Total: $9,156.
41. Endowment organized 1878. No figures available on assets or income.
42. Payment of dues for 25 years entitles one to life membership.
43. Sustaining membership—$5.00 to $15.00 annually.
44. Special assessment.
45. The present individual dues rates went into effect January 1, 1948. The total figure listed above was for the total annual receipts under the old dues rates, which were one-half the present rates.
46. Retired members pay no dues.

STATE BAR ASSOCIATION FINANCES

Association	ANNUAL INDIVIDUAL DUES				INCOME OTHER THAN DUES PER YEAR					Total Annual Receipts Including Dues
		Junior					Endowment			
	Regular (Individual)	Admitted Less Than	Dues	Other Dues	Advertising Revenue	Sales of Publications	Assets	Income	Other Income	
Alabama*	$25.00	2 years	0			25.00				15,000.00
Arizona*	5.00			1.00[1]						4,275.00
Arkansas*	5.00	5	2.50							4,500.00
California*	10.00			2.00[1]	2,000.00	250.00		2,200.00[2]	79,600.00[3]	222,912.01
Colorado	5.00[1-4]		1.00	1.00[5]				50.00[2]		6,093.59[7]
Connecticut	5.00	5	2.50		250.00					6,000.00
Delaware	10.00	5	5.00					[9]		1,800.00[8]
District of Columbia	18.00	3	9.00			100.00				
Florida	5.00	7	3.00		2,134.70	442.10				10,595.95
Georgia	7.50	5	3.75	1.00[5]	1,750.00	200.00	12,500.00[10]			15,000.00
Hawaii	10.00[11]	5	5.00							1,500.00
						50.00	750.00		1,000.00[13]	to 2,000.00
Idaho*	10.00[12]					4,000.00[16]		250.00[18]		6,500.00
Illinois	10.00[14]	5	5.00	5.00[15-5]	4,000.00 to 5,000.00	to 5,000.00	63,000.00[17]	to 300.00		65,000.00 to 70,000.00
Indiana	7.00	5	2.00		750.00	150.00				9,500.00
Iowa	6.00[19]	5	4.00		500.00	50.00	50,000.00[20]			17,000.00
Kansas	5.00				400.00	400.00				
Kentucky*	3.00									9,750.00
Louisiana*-[21]										
Maine	3.00									1,500.00 to 1,600.00
Maryland	7.00									6,700.00[8]
Massachusetts	5.00	3	2.00				1,500.00[22]	[23]		10,000.00
Michigan*	10.00				6,007.92[24]	319.05	1,745.00[25]			75,000.00 to 80,000.00
Minnesota	15.00[4]	3	5.00		4,500.00		6,000.00[26]			25,000.00[27] to 30,000.00
Mississippi*	5.00	1	0							6,500.00[8]
Missouri*	12.00[28]				800.00					47,000.00[29]
Montana	3.00									1,000.00 to 1,400.00
Nebraska*	10.00	5	5.00	2.00[1]						21,000.00
Nevada*	10.00			1.00[1]	570.00	714.75			2,259.50[30]	1,498.33
New Hampshire	5.00									1,650.00
New Jersey	10.00[19]	5	5.00				[31]			15,000.00
New Mexico*	5.00									2,500.00
New York	10.00[32-14]	5	5.00		1,000.00	70.00				65,000.00
North Carolina*-[21]										
North Dakota*	10.00[33]									12,000.00[34]
Ohio	8.00	4	4.00		1,335.00	731.00			300.00[35]	39,000.00
Oklahoma*	10.00[36]			4.00[1]	736.15	289.00			8,084.05[36]	39,875.20[37]
Oregon*	6.00			2.00[1]	2,840.00				5,260.00[38]	20,000.00
Pennsylvania	10.00[19]	5	4.00				40,000.00[39]			30,000.00
Rhode Island	15.00[4]	5	7.50							9,000.00[8]
South Carolina	10.00									3,000.00
South Dakota*	5.00			2.00[1]		150.00				4,360.32
Tennessee	5.00	5	2.50							6,500.00
Texas*	4.00				2,000.00 to 2,500.00	100.00 to 200.00			500.00[3]	39,000.00
Utah*	7.50			2.50[1]						9,156.50[40]
Vermont	5.00					30.00	[41]			1,700.00[31]
Virginia State Bar*	5.00	5	3.50							15,000.00
Virginia (Voluntary Association)	5.00	3	3.00							5,000.00
Washington*	10.00			2.00[1]	1,600.00					28,000.00
West Virginia*	5.00									7,100.00
Wisconsin	12.00[42-43]	5	6.00		1,250.00 to 1,300.00	200.00			2,000.00[44]	18,000.00[45]
Wyoming	10.00[46]	5	5.00							2,500.00[8]

(Footnotes on opposite page)

State Administrative Law Essay Contest Extended

The Section of Administrative Law of the American Bar Association has announced that the closing date for submitting essays has been extended from December 31, 1948, to September 1, 1949. In conjunction with this step the eligibility rules have been revised to admit as contestants members of the American Bar Association elected prior to August 1, 1949.

The first prize has been increased to $1,500, and a second prize of $500 has been added. In addition, the following states have authorized local prizes for the best essay submitted from the state:

Arizona	$100	New Jersey	$100
Arkansas	200	New York	250
Colorado	150	Oregon—1st	150
Delaware	50	2nd	100
Minnesota	100	Pennsylvania	250
Nebraska—1st	100	Texas	500
—2nd	50	Virginia	100
New Hampshire	100	West Virginia	200

Inquiries concerning the contest should be addressed to Omar C. Spencer, Chairman, Contest Committee, Yeon Building, Portland 4, Oregon, or to J. Tyson Stokes, 123 South Broad Street, Philadelphia 9, Pennsylvania, the newly appointed co-chairman.

Colorado Bar Integration Bill Introduced; Florida Petition Argued

A long form bill for an act to regulate the practice of law and to provide for the organization, government, membership and powers of an integrated "State Bar of Colorado" has been drafted and introduced in the Colorado legislature by the Colorado Bar Association. It provides for government of the bar by a board of governors, but that "the State Bar shall not have the power and authority to fix the fees to be charged by the members thereof for legal services rendered by them." Dues are to be $10 a year, but may be increased by the board of governors to as high as $15. The board of governors would have power to discipline and disbar, subject to review by the state supreme court.

On January 18 the petition of the Florida State Bar Association for integration of the Florida bar by rule of court was argued before the Supreme Court of Florida. A ruling is expected some time next month. James D. Bruton, Jr., of Plant City, is chairman of the sponsoring committee. David M. Klausner of Jersey City is chairman of a Special Committee on Integration of the Bar recently appointed by Judge N. Louis Paladeau, Jr., president of the New Jersey State Bar Association.

Paragraphs

"You and the Law" is the title of a series of thirteen weekly dramatized radio programs begun last month over eleven Colorado stations under sponsorship of the Colorado Bar Association. Subjects covered will include wills, legal problems of home ownership, the lawyer's services, the Colorado court system, divorce, judicial reform, court room procedure, contracts, juvenile courts, settlement of cases, simplified legal procedure, and legal aid. Some out-of-state listeners may be able to pick it up on KFEL, Denver, Sunday evenings at 8:15, Mountain Standard Time.

The Special Commission for the Improvement of the Administration of Justice created by the 1947 North Carolina legislature has submitted its report to the 1949 legislature. Its recommendations, with drafts of appropriate bills, include provision for judicial rule-making power, administrative supervision of the judicial system, a judicial council, establishment of pre-trial procedure on a state-wide basis, improvements in methods of selecting jurors and changes in jury exemption laws, an expanded probation commission, waiver of indictment and waiver of jury trial.

New rules of appellate procedure adopted by the judges of the Courts of Appeals of Ohio went into operation on January 1.

The National Association of Retail Druggists at its recent Atlantic City convention adopted a resolution to join the movement to eliminate offensive comic books, and specifically to put an end to their distribution in drug stores.

Municipal and town court judges in Connecticut will now be nominated by the governor and confirmed by the legislature instead of being appointed by the legislature alone as in the past, under an amendment to the state constitution which recently took effect.

A federal courts division of the criminal courts branch of the Legal Aid Society of New York was established last month.

The Reader's Viewpoint

Third Circuit Was First

To the Editor:

I appreciate the article in the December issue of the JOURNAL referring to our new rule in the Fourth Circuit with regard to hearing appeals on the original papers as allowed by Rule 75(o) of the Rules of Civil Procedure. I feel that I must say, however, that our Circuit cannot claim to be the pioneer in the adoption of the rule. That honor belongs to the Third Circuit, which adopted it early last year. Hon. John Biggs, the able Chief Judge of the Third Circuit, sent me a copy of the rule upon its adoption, and the Judicial Conference of our Circuit considered it at our June meeting and recommended its adoption by our Court of Appeals, which adopted it in October.

JOHN J. PARKER.

Charlotte, N. C.

Right to Counsel in Michigan

To the Editor:

The excellent article in your December issue "The Right of an Accused to the Assistance of Counsel" by John R. Snively concerns a subject of particular importance at this time, and one which deserves a great deal of consideration from the legal profession. We note that in commenting on the action of the Supreme Court of Illinois he states: "This rule is the first of its nature to be adopted by any state court." We believe he has overlooked the prompt and meritorious action of our Michigan supreme court, which adopted a somewhat similar rule on June 4, 1947, effective September 1, 1947. This is Rule 35a of the Michigan Court Rules. We note this merely in a constructive way and it is not intended in any sense as a criticism of the article.

R. GERALD BARR

Port Huron, Mich.

Editor's Note: Following is the text of Rule 35a, which does cover much the same ground as the Illinois rule:

"In every prosecution wherein the accused is charged with a felony, the trial court shall conform to the following practice:

"Section 1. Arraignment. If the accused is not represented by counsel upon arraignment, before he is required to plead the court shall advise the accused that he is entitled to a trial by jury and to have counsel, and that in case he is financially unable to provide counsel the court will, if accused so requests, appoint counsel for him. If the accused states he will procure counsel or requests that counsel be appointed, a reasonable time thereafter shall be allowed for counsel to consult with the accused before his plea shall be taken.

"Section 2. Imposing sentence. If the accused pleads guilty after such plea and before sentence the court shall inform the accused of the nature of the accusation and the consequence of his plea, and regardless of whether he is represented by counsel, the court shall examine the accused, not necessarily under oath, and as a condition of accepting the plea of guilty and imposing sentence shall ascertain that the plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. Unless the court determines that the plea was so made it shall not be accepted.

"Section 3. Record. The trial court shall cause a stenographic record to be made and promptly transcribed of the proceedings had under Sections 1 and 2 above, and shall certify over his signature thereto that the same is a true record of the proceedings had. Thereupon the record so made shall be filed with the clerk of the court and become and be kept as a part of the record in the case. In any subsequent proceedings such record shall be competent evidence of the facts and circumstances therein recorded."

Mention might also be made of the recent Kentucky case of *Gholson* v. *Commonwealth*, 212 S. W. 2d. 537 (1948), wherein that court overruled a series of prior cases to establish a like rule. Mr. Justice Cammack's opinion included the following words:

"In addition to legal rights and guarantees, common justice demands that every person accused of a felony be given a fair and impartial trial. This would include the informing of an accused at the beginning of his trial by the judge relative to his legal rights and guarantees; and especially is this true where a plea of guilty is offered and entertained. It is incumbent upon the trial judge to determine whether the waiver of a right to be represented by counsel is made 'intelligently, competently, understandingly and voluntarily.'"

Defending the Defender

To the Editor:

I have before me your December, 1948, issue, and I am interested in the article on the public

defender system by William Scott Stewart.

I acted under appointment of the judges of the Superior Court in Fairfield County, Connecticut, as public defender for the years 1935 to 1942, and I have been intimately acquainted with the doings of my successor in that office since 1942. In criticism generally of Mr. Stewart's article, I believe he has made the mistake of reasoning from the specific to the general. He does not even state whether the public defenders in other counties in Illinois are doing satisfactory work, but a more important error he makes is in assuming that because one or more public defenders do not do their jobs well the system is wrong.

The work of the public defenders in Connecticut has been so satisfactory that I believe that you would find that the vast majority of those who have been represented by public defenders here would agree that they had received as full protection of the law as if they had engaged private counsel. I know of one accusation of conspiring against a client, but that accusation was withdrawn and never reiterated, as far as I know. The Board of Pardons in this state is the place where it is to the advantage of the prisoner to protest that the public defender did not give him fair representation, and even before this board that accusation is seldom made, according to one of the members of the Board to whom I talked today.

Mr. Stewart seems concerned about the invasion of the public defender in the field of those clients who may be able to pay a fee, since he complains that the public defender never bothers very much to see if the prisoner is unable to hire private counsel. This would also seem to prove that the public defender is not desirous of relieving himself of his obligations. On the other hand, twice at least I requested the court to instruct an accused with funds to spend them for private counsel, and bond cases were always suspect.

I believe that if the low grade of defense of which Mr. Stewart accuses his public defender applies to any practitioner, it is to that small group from which, in those states not having a public defender, the defense attorney is assigned.

It is true that in this state the public defender does not often ask for long continuances. It is, I think, his observation that the continuances asked by private counsel are to permit the accused to get together, by fair means or foul, some money for his private counsel, and that it is the desire of the accused to have a prompt trial. In this state the public defender's cases are at least as well prepared and tried as the average of private counsel, if not better. Mr. Thomas R. Robinson, long time public defender in New Haven, told me that he spent $600 of the state's money proving successfully the innocence of one accused.

There has been nothing in my experience or in that of the incumbent as public defender to inhibit the work. That the salary and expenses are paid by the state is not a handicap—it simply removes one irritation in the client-attorney relationship. That he has over half of the criminal cases is no handicap, since he can thereby throw a good deal of weight around with the judge, jury and prosecutor. It is true that the accused and he alone, with the best of advice, must make the decision whether to plead guilty or stand trial, but appeals, habeas corpus, new trials, pardons, etc., are all within the discretion of the public defender after listening to the story of the accused and investigating the facts. These rules do not handicap him in his duties, assuming, as we must in testing the principle, that the incumbent is able and industrious.

It would seem that the chances of securing an able public defender are better by appointment than by election, but on the other hand, the appointive system works well here because the appointing power, the judges of the Superior Court, are removed from politics and have no reason not to appoint able lawyers.

JOHNSON STODDARD

Bridgeport, Conn.

The McCollum Case

To the Editor:

The address by Dean Clarence E. Manion of Notre Dame University printed in the October JOURNAL is both interesting and thought-provoking.

In his introduction he gives praise to our system of government, and states that "uncounted millions all around the world now prize, next to life itself, the hoped-for opportunity to come to the U. S. A. where constitutions and laws are made to protect the God-given rights

of the individual God-made man." Such high and worthy praise of our nation and its institutions, constitutions and laws so beautifully and patriotically expressed thrills the heart of every true American and gives reason to all who love this, the best of all nations, to commend the Dean for his motive and effort.

Because we share his sentiments in that regard, we regret that his criticism of the Supreme Court's decision in the McCollum case is not equally commendable. The gist of the McCollum decision is that it prohibits the teaching of religious doctrine in the public schools during school hours. Dean Manion says that by reason of this decision, "henceforth God and morality must be separated from the affairs of state by an impenetrable wall," and he further remarks:

"Inferentially, the decision excises the Declaration of Independence and the constitution of practically every state of the Union as trespassers upon its newly-erected 'wall of separation'. Expressly, it dogmatizes the modern determination to secularize American law and government. It tells us categorially that what we have treated as a silk purse is in reality a sow's ear and henceforth must be so regarded . . . If we rule God and morality out of our constitutional system, the thing that remains will neither produce justice nor preserve freedom."

This, to our mind, is not a fair and warranted construction of the Court's holding. It is pertinent to inquire what is meant by "God and morality." If prohibiting religious education in the public schools is identified with excluding God and morality from our constitutional system, we most heartily dissent from such a definition. Morality is not necessarily religion; neither can it be said that a belief in God is necessarily requisite to being moral. If God and morality are the same, we must, to be rightly informed, know to what god reference is made. No doubt the god referred to in the address is the Christian God, but there are also the gods of the Mohammedans, the Buddhists, the Confucians and others. Which has been excluded?

Our forefathers, realizing that the teaching of sectarian religious doctrines in the schools was a dangerous policy which would lead to irritation and religious dissensions in our schools and disturb the peace and harmony of our nation, very wisely by constitutional limitations excluded such a dangerous policy. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Article VI provides, among other things, that "no religious test shall ever be required as a qualification to any office or public trust under the United States." The Supreme Court has very fairly and justly interpreted our Constitution in this regard.

The charge that the McCollum decision "excises the Declaration of Independence and the constitution of practically every state in the Union" appears unwarranted in view of constitutional provisions in force in Wisconsin and Nebraska. The Wisconsin constitution (Art. 1-18, Cl. 2) declares that "no man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent." The Nebraska constitution (Article 8, Section 2) provides that "No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes."

The Supreme Court of Wisconsin, construing this section has said (*State* v. *District Board*, 76 Wis. 177):

"The only object, purpose or use for taxation by law in this state must be exclusively secular. There is no such source and cause of strife, quarrels, fights, malignant opposition, persecution and war and all evil in the state as religion. Let it once enter into our civil affairs and our government would soon be destroyed. Let it once enter our common schools and they too would be destroyed. Those who made our constitution saw this, and used the most apt and comprehensive language in it to prevent such a catastrophe."

The Supreme Court of Nebraska (*State ex rel. Freeman* v. *Schee*, 65 Neb. 853) has construed the Nebraska provision similarly.

The opinions in these cases were rendered long before the McCollum case was decided, and are in harmony with it. Nor are these two states alone in the stand they have taken. Numerous courts have held that it was not their purpose to interfere with religious instruction in its proper place, that in denominational schools and at home instruction of such nature might be commendable, but that the public schools are not the place for it.

GEORGE J. MARSHALL

Riverton, Neb.

The Literature of Judicial Administration

BOOKS

Your Public Relations, edited by Glenn Griswold and Denny Griswold. Symposium of articles by thirty-four prominent authorities in the public relations field. New York: Funk and Wagnalls and Modern Industry Magazine, 1948. Cloth, pp. xiv and 634. $7.50.

The JOURNAL's request for a review copy of this book was rejected by one of the co-editors with the hint that instead of seeking a free copy we should be buying it in bulk for our membership and adding pointedly that "I know of no profession that has so urgent a need for public relations indoctrination as the legal profession." We borrowed $7.50 and bought the book, partially in the hope of being able to recommend to our professional brethren a tool by means of which they might hope to lift themselves in the Griswolds' esteem, but chiefly to see whether the method so deftly used to win our own good will was recommended in the book or whether it had been an inspiration of the moment. On the latter point our search was fruitless, but we found enough useful information and ideas in the book to warrant our recommending it strongly to bar association officials and others who are or ought to be interested in the public relations of the legal profession.

Like most public relations literature, it is beamed at business organizations, but in greater measure than most of them it is also largely applicable to our field. The following selected chapter headings will give an indication of what may be expected from it: Public Relations—Its Responsibilities and Potentialities; How to Organize a Public Relations Department; How to Use Public Relations Counsel; How to Use the Public Relations Department of an Advertising Agency; Association Public Relations; How to Use Opinion Surveys in Public Relations; How to Tell the Public Relations story through Schools; Public Relations Tools and Media; Publicity — a Tool of Public Relations; Relations with the Press; How Public Relations Serves the Editor; How to Hold a Press Conference; How to Prepare and Place a Feature Article; How to Use Audio-Visuals in Public Relations; Radio and Television in Public Relations; Public Relations Advertising; How to Conduct a Membership Campaign; Public Relations of Fund-Raising; and by way of climax, How to Get Along with Your Associates—worth having in any law office.

Handbook of Business Letters, by L. E. Frailey. New York: Prentice-Hall, Inc., 1948. Cloth, pp. vii and 1,301. $12.50.

The lawyer who writes a good brief probably writes a good letter, but most briefs could be improved and so could most lawyers' letters. Here is a comprehensive text on all aspects of letter-writing, reinforced by thousands of real-life examples accumulated during the author's lifetime career as a business letter specialist. The book makes fascinating reading throughout, and it is an extraordinary letter-writer who will not find counterparts of his own bad habits here and there among its exhibits. Do you still write after the pattern of what Mr. Frailey calls "The Ancient Lullaby?:"

We beg to advise and wish to state
That yours has arrived of recent date.
We have it before us, its contents noted,
Herewith enclosed the prices we quoted.
Attached you will find as per your request
The sample you wanted, and we would suggest
Regarding the matter and due to the fact
That up to this writing your order we've lacked,
We hope that you will not delay it unduly,
And we beg to remain, yours very truly.

ARTICLES

"Conciliation Rather Than Reconciliation," by Julius H. Miner. Illinois Law Review, September-October, 1948, pp. 464-494.

"Louis D. Brandeis as a Lawyer," by Edward F. McClennen. Massachusetts Law Quarterly, September, 1948. (Special Number.)

"Criminals' Control Requires Individualized Handling," by Albert J. Harno. Virginia Law Weekly, November 4, 1948, p. 1.

"Justice Under the Commissars," by Milton B. Badt. The Nevada State Bar Journal, October, 1948, pp. 194-5.

"Law and Lawyers in American Colonial Days," by Edward J. Dempsey. The Nevada

State Bar Journal, October, 1948, pp. 190-193.

"Motion Pictures as a Basis for Practice Litigation," by Charles W. Joiner. Michigan State Bar Journal, November, 1948, pp. 26-29.

"Practice Before Administrative Agencies," by Frank E. Cooper. Michigan State Bar Journal, November, 1948, pp. 42-48.

"Justice in the New Order," by Mr. Justice Read. The Advocate (Vancouver, B. C.), September-October, 1948, pp. 168-173.

"Boys' Courts: Individualized Justice for the Youthful Offender," by J. M. Brande, Federal Probation, June, 1948, pp. 9-14.

"A Layman Views the Court," by W. A. Bailey. Federal Probation, June, 1948, pp. 24-31.

"Adultery Is My Business," by a professional co-respondent. Magazine Digest, January, 1949, pp. 59-62.

"How the Legal Aid Bureau Operates," by Cleveland Thurber. The Detroit Lawyer, January, 1949, pp. 5-8.

"Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication," by I. M. Rabinowitch, M. D. Canadian Bar Review, December, 1948, pp. 1437-1463.

"Alabama Judges under Elective System," by Wm. Logan Martin. Alabama Lawyer, January, 1949, pp. 5-20. (Data on number of judges originally appointed by governor; also on salaries of judges since 1892).

"The Improvement of the Administration of Justice in North Carolina," report of the Special Commission. Popular Government, monthly published by the Institute of Government, University of North Carolina, January, 1949, pp. 1-16. (Recommendations of the Commission, including drafts of proposed legislation).

"Investigations and Immunity," by Sidney H. Asch. Bar Bulletin, New York County Lawyers Association, January, 1949, pp. 25-36.

"Legal Aid as It Operates in a Medium-Sized Industrial City," by George H. Bradt, III. Michigan State Bar Journal, January 1949, pp. 27-30. (The city is Flint, Mich.)

"The Dilemma of American Judges," by Charles E. Clark. American Bar Association Journal, January, 1949, pp. 8-11, 79-81.

"Fortifying the Supreme Court's Independence," by Owen J. Roberts. American Bar Association Journal, January, 1949, pp. 1-4.

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